STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 254012 Oakland Circuit Court
BARRY LEIGH WHITTAKER, Defendant-Appellant.	LC No. 2003-189091-FH

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felonious assault, MCL 750.82, and domestic violence, MCL 750.81(2). Defendant was sentenced as an habitual offender, fourth offense, to 4 to 15 years in prison on the felonious assault conviction and 93 days in jail on the domestic violence conviction. We affirm.

This case arose when defendant came home to find his girlfriend's ex-boyfriend paying her a visit. Defendant passed the ex-boyfriend standing in the doorway, entered the house, and went into the kitchen. He began arguing with his girlfriend, and returned to the doorway with a steak knife. He swung the knife twice at the ex-boyfriend, who escaped through the door and ran to a neighbor's house to call the police. Defendant chased the ex-boyfriend for a while, but then returned to the house. According to statements the girlfriend later made to the ex-boyfriend, she tried to call the police immediately but could not dial and hold her child at the same time. She then ran with her child out the back door, but she caught her foot on a fence trying to climb over it. After abandoning his chase of the ex-boyfriend, defendant went back through the house, ran across the back yard, hopped the fence, and repeatedly hit the girlfriend on the left side of her face. The ex-boyfriend testified that he could hear the girlfriend screaming from across the street. Defendant dropped the knife sometime during the assault, but picked it up again before fleeing at the sight of neighbors emerging from their homes. He drove off in his car, and police arrived moments later. The girlfriend's face was badly bruised, and she immediately explained the circumstances of the assault to police and the ex-boyfriend.

Defendant first argues that the prosecutor improperly failed to call the girlfriend as a witness. We disagree. Defendant failed to preserve this issue, so we review it for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant essentially argues that the prosecution must present the testimony of all complaining witnesses before it may obtain a conviction, and that the prosecution's use of the girlfriend's

statements without calling her as a witness violated his right to confrontation. We disagree. As an initial matter, every crime is an offense against the state, not a particular individual, so the unwillingness of a "complainant" to cooperate does not, in itself, thwart prosecution.

Here, the prosecution elicited inculpating testimony from the girlfriend at the preliminary examination but apparently had reason to believe that she would not testify favorably testimony at trial–notwithstanding her role as the "complainant." While the prosecution did not call the girlfriend at trial, defendant concedes that the prosecution's disclosure of the girlfriend in its res gestae witness list and her availability[1] on the second day of trial satisfied the prosecution's statutory duty to notify defendant of her existence and assist him in securing her attendance. MCL 767.40a. The statute no longer requires prosecutors to call every res gestae witness, *People v Koonce*, 466 Mich 515, 517-520; 648 NW2d 153 (2002), and defendant fails to direct us to any legal authority reinstating this obligation, even for "complainants."

Similarly, the prosecutor's admission of the girlfriend's statements through other witnesses did not implicate the confrontation clause because the trial court provided defendant with the opportunity to present the witness, cross-examine her, and otherwise challenge the hearsay testimony. *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105; 39 L Ed 2d 347 (1974); MRE 806. Therefore, defendant's constitutional argument lacks any merit, and we find no error, plain or otherwise.

Defendant next argues that the trial court erred when it denied defendant's motion for a mistrial based on the prosecutor's failure to provide defendant with two written statements before trial. We disagree. A mistrial is only appropriate when the effect of an error is so prejudicial that it prevents the accused from receiving a fair trial, and we review for abuse of discretion a trial court's decision on a motion for mistrial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). In this case, defendant filed a timely discovery request for any statements defendant had made to the police. The prosecution did not disclose any statements. On the day of trial, however, an investigator spoke with the prosecutor after an interview with the ex-boyfriend and verified that the police had received statements directly from defendant. The prosecutor told the investigator that she did not know defendant had made any statements, and the statements were immediately disclosed to the prosecutor and defense counsel. Defendant's first statement to police, written out by an officer, admitted that he struck the girlfriend while she was entangled in the fence. Defendant wrote the second statement himself, and in it he claimed that he brandished the knife in self defense and crossed the back yard only to speak with his girlfriend in a vain attempt to calm her down. The statement he wrote did not admit that he struck her.

The prosecutor responded to defendant's motion for mistrial by stating that she would not introduce any of the statements into evidence, but she reserved the right to use the statements for impeachment if defendant testified. At that point in the trial, the only testimony taken was the ex-boyfriend's direct examination and a portion of his cross examination. The trial court found

[1] On a collateral note, the fact that she was available at trial was irrelevant to the admissibility of her hearsay statements under the "excited utterance" exception. MRE 803(2).

that defendant failed to demonstrate any prejudice from the prosecution's failure to produce the documents, and denied defendant's request for mistrial. It offered defendant as much as a week to review the documents and prepare a defense against them, but defendant requested only about an hour, and trial continued as scheduled. Defendant did not testify at trial, and the documents were not introduced against him.

A prosecutor's failure to disclose material evidence that is favorable to an accused violates due process. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, criminal defendants do not otherwise possess a general constitutional right to discovery, *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994), so evidence withheld by the prosecution only implicates due process if it is material and favorable. *Brady*, *supra*; *People v Elston*, 462 Mich 751, 765-766, n 6; 614 NW2d 595 (2000). The portions of defendant's statements that bolstered his claim of self-defense were immaterial because they were inadmissible hearsay. *People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998). The remaining statements were not exculpatory because they contained defendant's admission that he struck his girlfriend while she was struggling to free her foot. Therefore, no use of this tardily disclosed evidence at trial would have risen to the level of a constitutional violation. *Elston*, *supra*.

Nevertheless, if a defendant makes a timely request, the prosecution is obligated by court rule to produce a defendant's written or recorded statements to police. MCR 6.201(B)(3).[2] Sanctions for failure to make timely disclosure are within the trial court's discretion, and we review them to determine whether the trial court properly weighed the interests of the court and the parties, including the bad faith of the prosecutor and the prejudice to the defense. *People v Taylor*, 159 Mich App 468, 482-483, 487; 406 NW2d 859 (1987). In *Taylor*, we noted that the sanction of exclusion was an extreme remedy advisable in only the most egregious cases. *Id*. at 487. Here, the requested sanction of dismissal would have been even more severe and would have put defendant in a much better position than if the prosecutor had faithfully produced the documents. In this case, the prosecutor voluntarily submitted to a self-imposed exclusion sanction, the trial court willingly offered to postpone trial for a week so defendant could adequately review and prepare in light of the statements, and defendant's opening statement substantially corresponded with the undisclosed documents. Therefore, the mere existence of the documents did nothing to reinforce or degrade the defense and did not jeopardize defendant's opportunity to receive a fair trial. In contrast, defendant failed to present any evidence that the prosecutor acted in bad faith by withholding the statements. Therefore, the trial court did not abuse its discretion when it weighed the relevant interests and denied defendant's motion for a mistrial. *Lugo*, *supra*; *Taylor*, *supra*.

Finally, defendant argues that the trial court erred when it allowed the introduction of his girlfriend's hearsay statements. We disagree. We review for abuse of discretion a trial court's

[2] The record does not contain sufficient detail for us to determine whether the investigator's handwritten account of his interview with defendant qualifies as a written statement under this rule, *People v Holtzman*, 234 Mich App 166, 178-179; 593 NW2d 617 (1999), but our ultimate resolution of the larger issue renders this peripheral issue moot.

decision on evidentiary matters. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). Furthermore, we will not reverse based on an evidentiary issue unless the error adversely affects a substantial right. MRE 103. Here, the prosecutor argued that the girlfriend made her statements to police and her ex-boyfriend while still under the stress of the assault, so the "excited utterance" exception to the hearsay rule applied. MRE 803(2). The trial court overruled defendant's objections on this basis.

According to the record, a police officer arrived on the scene seconds after the girlfriend's neighbors called the police, which occurred immediately after defendant fled. When the police officer arrived, the girlfriend was squeezing her young child, yelling, and crying hysterically. At first, the officer saw the injuries to the girlfriend's feet, but he could only get fragments of information from her, so he asked her to calm down. She then explained how defendant assaulted her. The other witnesses described the girlfriend as slightly calmer, but still visibly upset. The last witness to hear the girlfriend's account was another police officer who questioned the girlfriend approximately twenty minutes after the assault.

A court may only admit hearsay testimony into evidence if it fits an exception to the rule that generally excludes hearsay. MRE 802. While hearsay, the "excited utterance" exception certainly applies to the girlfriend's first statements because she clearly made them about a "startling event" while "under the stress of excitement caused by the event . . . ." MRE 803(2); see also *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Though the exclusion applies less patently to the girlfriend's subsequent retelling of her experience to her ex-boyfriend and the second officer, the admission of these redundant statements into evidence does not amount to an abuse of discretion that affected defendant's substantial rights. MRE 103; see also *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Michael J. Talbot